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# Hunnuh Mus' Tek Cyare da Root fa Heal da Tree: Saving the South Carolina Lowcountry from Overdevelopment through Judicial Application of a Modern Public Trust

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# "HUNNUH MUS' TEK CYARE DA ROOT FA HEAL DA TREE":* SAVING THE SOUTH CAROLINA LOWCOUNTRY FROM OVERDEVELOPMENT THROUGH JUDICIAL APPLICATION OF A MODERN PUBLIC TRUST

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* "Hunnuh mus' tek cyare da root fa heal da tree" is a Gullah proverb. "One must take care of the root to heal the tree," emphasizes that solving a problem or holistically caring for or healing anything requires taking care of the "root," or the essence, of the thing. Queen Quet, *We Are Not an Island*, SOJOURNERS 33 (Aug. 2014). In this sense, the "root" of South Carolina's Lowcountry is its waterways.

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## I. INTRODUCTION

South Carolina's Lowcountry, a culturally and ecologically unique area ranging from Charleston to the Savannah River, is experiencing rapid urban expansion and industrialization that puts at risk the health of the salt water marshes, rivers, and beaches[1] that have played an integral role in the lives of the local populations for more than three-hundred years.[2] For generations, locals have pulled their livelihood from, traded via, and recreated on the rivers and beaches of the Low County.[3] The self-sustaining and isolated nature of the Lowcountry has allowed for the development of regionally unique cultures such as the Gullah;[4] historical treasures like Charleston, Beaufort, Bluffton, and Savannah;[5] and exclusively local norms such as painting windowsills and porch roofs "Haint Blue,"[6] the Gullah language and storytelling,[7] the crafting of sweetgrass baskets,[8] Frogmore Stew (aka Lowcountry Boils),[9] and oyster roasts.[10]

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1. *Marshes*, EPA, http://water.epa.gov/type/wetlands/marsh.cfm (last visited Jan. 20, 2017) [hereinafter *Marshes*].

2. *History of the City*, CHARLESTON, S.C., http://www.charleston-sc.gov/index.aspx?nid=110 (last visited Jan. 20, 2017); *Guides to Beaufort*, BEAUFORT, S.C., http://www.beaufortsc.org/guides/history/ (last visited Jan. 20, 2017).

3. *See* Ramon Jackson, *Gullah Cultural Traditions: Origins and Practices*, CHARLESTON'S AFRICAN AM. HERITAGE, http://www.africanamericancharleston.com/gullah.html (last visited Jan. 20, 2017).

5. Due to their geographic location and strong sense of community, the Gullah have been able to preserve more of their African cultural heritage than any other group of African Americans: they speak a creole language similar to the Krio of Sierra Leone, are skilled in the creation of African style handicrafts and enjoy a rich cuisine based primarily on rice. The origin and traditions of this group are an important piece of South Carolina's historical puzzle. By exploring their history and development, one gains a fuller picture of South Carolina's past. *Id.*

6. Although Savannah is located in Georgia, and is not the South Carolina Lowcountry, it is nonetheless a shining example of Lowcountry culture.

7. Michele Norris, *Why so Blue? Color Graces Many a Porch Ceiling*, NPR (Aug. 14, 2006), http://www.npr.org/templates/story/story.php?storyId=5645263.

8. Gullah is an English-based creole language containing many African loanwords and significant influences from African languages in grammar and sentence structure. *Gullah*

Aside from the Lowcountry's cultural richness, South Carolina's Lowcountry also plays an integral role in maintaining the economic health of the State.[11] A 2009 study, "Underappreciate Assets: The Economic Impact of South Carolina's Natural Resources" by the University of South Carolina Moore School of Business, found that "well-managed natural resourced are essential for economic development," and "South Carolina's natural resources are essential for economic development and contribute nearly $30 billion and 230,000 jobs to the state's economy."[12] Additionally, South Carolina's Department of Natural Resources reports that in 2008, South Carolina's Coastal Tourism, not including historic tourism, added value of approximately $3.5 billion, supporting 81,000.[13]

Moreover, the importance of the Lowcountry's tidelands' ecology extends beyond monetary value—in some sense, the health of the tidelands has a direct effect on the health of the entire state. South Carolina is the eleventh smallest state, but boasts the eleventh longest coastline[14] at 2876 miles of tidal shoreline.[15] The 350,000 square acres of tidal marshes along South Carolina's coastline, comprising 30% of all tidal marsh in the United States' eastern seaboard,[16] function as natural filtration and drainage

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*History*, GUIDES TO BEAUFORT, http://www.beaufortsc.org/guides/gullah-history/ (last visited Jan. 18, 2017).

8. Sweetgrass baskets are almost identical in style to the shukublay baskets of Sierra Leone, a tradition brought to the region by the Gullah during the West African slave trade in the 17th century. *The Origins of Sweetgrass Baskets*, SCIWAY, http://www.sciway.net/facts/sweetgrass-baskets.html (last visited Jan. 18, 2017).

9. Francine Maroukin, *The Lowcountry in One Pot*, GARDEN & GUN (June 2009), http://gardenandgun.com/article/lowcountry-one-pot.

10. *History of the City*, CHARLESTON, S.C., http://www.charleston-sc.gov/index.aspx?nid=110 (last visited Jan. 20, 2017); *Guides to Beaufort*, BEAUFORT, S.C., http://www.beaufortsc.org/guides/history/ (last visited Jan. 20, 2017).

11. *Id.*

12. *Economic Impact of S.C.'s Natural Resources and the SCDNR*, S.C. DEP'T OF NAT. RES., http://www.dnr.sc.gov/overview/impact.html (last visited Jan 18. 2017) [hereinafter *Economic Impact*].

13. *Id.*

14. *Geography: United States*, U.S. CENSUS BUREAU, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_GCTPH1.US01PR&prodType=table (last visited Jan. 23, 2017).

15. *Coastal Environment*, S.C. DEPT. OF HEALTH & ENVTL. CONTROL, http://www.scdhec.gov/HomeAndEnvironment/Water/YourCoastalEnvironment/mindex.htm (last visited Jan. 23, 2017).

16. Kim Counts & Laura Lee Rose, *Life Along the Salt Marsh: Protecting Tidal Creeks with Vegetative Buffers*, S.C. WATERWAYS (Nov. 2013), http://www.clemson.edu/extension/hgic/water/resources_stormwater/life_along_the_salt_marsh_protecting_tidal_creeks_with_vegetative_buffers.html [hereinafter *Life Along the Salt Marsh*].

systems, preventing mainland flooding by providing a runoff area.[17] Furthermore, tideland vegetation buffers rough and quick flowing waters, acting as a natural breakwater and preventing coastline erosion.[18] But, most importantly, tideland vegetation provides for the foundation of the food web for the entire southeastern seaboard, as well as offering habitat and nesting sites for numerous species of water fowl, migratory birds, and commercially and recreationally important fish, crabs, clams, and oysters.[19] The salt marsh is ranked as one of the most biologically productive ecosystems on earth, providing nursery grounds for many species of birds and fish, as well as vital wildlife habitat.[20]

However, despite the multitude of reasons the State has to protect its beaches and tidelands, overdevelopment and industrial growth poses a dire threat to the health of the Lowcountry's waterways, culture, and economy.[21] Litter, household garbage, and harmful runoff pollution from sprawling suburban communities, poorly designed urban areas, golf courses, highways, and industrial waste from manufacturing plants all wash into the tidelands and ocean after every rain, polluting the waterways and putting at risk the health of the ecological system and, subsequently, the economic health of the entire State.[22] If onshore overdevelopment is not enough, the Lowcountry also faces risks that coincide with impending oil drilling off the coast.[23] Ultimately, while the State and its municipalities have viable interests in the economic growth that accompany development, unchecked development puts at risk the environment that already provides so much, economically and culturally speaking, for the State and its denizens.[24] This raises the question as to whether the development-derived benefits are worth the environmental/cultural/economic costs, and, if so, whether the State is even permitted to act on this assessment. Arguably, even if the State were to conclude that the economic value of development in the Lowcountry surpassed the costs, South Carolina's Public Trust Doctrine precludes the State from permitting such development.

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17. *Marshes*, *supra* note 1.

18. *Id.*

19. *Life Along the Salt Marsh*, *supra* note 16.

20. *Id.*

21. *See id.*

22. *Id. See also Economic Impact*, *supra* note 12 (asserting that South Carolina's economy is highly dependent upon the health and maintenance of the State's natural resources).

23. *Project Offshore Drilling*, COASTAL CONSERVATION LEAGUE, http://coastalconservationleague.org/projects/offshore-drilling-2/ (last visited Jan. 23, 2017).

24. *See Life Along the Salt Marsh*, *supra* note 16.

This Note will discuss in Part I the history of the Public Trust Doctrine and why under the United States' system of federalism there are fifty separate public trusts. Part II will introduce the reader to both modern and traditional iterations of the Public Trust Doctrine and attempt to convince the reader that the Modern Public Trust Doctrine is more suitable to the present state of affairs than the Traditional Public Trust Doctrine.[25] Part III reaches the conclusion that South Carolina has a Modern Public Trust Doctrine by way of a thorough review of statutes and case law regarding private actions related to Public Trust property.[26] Finally, Part IV explores various claims against the State and third-party developers for harm to the Public Trust, including the possibility of applying actual trust law to Public Trust interests, with the State playing the role of trustee, and interested denizens playing the roles of beneficiaries of the trust.[27]

## II. HISTORY OF THE PUBLIC TRUST

### *A. The Roots of the Doctrine*

The Public Trust Doctrine has a long and nuanced history. While the doctrine's origins likely predate codification,[28] the oldest existing recorded representation of a law that established a communal public interest in waterways, the lands beneath them, and their adjacent shorelines was established in the Institutes of Justinian during the tail end of the Roman Empire, during the reign of Justinian I.[29] From Justinian's Codex, the doctrine took hold throughout Europe under the reaches of the Roman Empire.[30] Ultimately, like countless other Roman laws and customs, the doctrine survived the collapse of the Roman Empire and continued to be enforced in some form or another in the European nations that formed

25. *See infra* Part II.

26. *See infra* Part III.

27. *See infra* Part IV.

28. *See* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 428–31 (1989) (making note of communal water interests in early African, Asian, European, Islamic, and Native American customary law).

29. Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633–34 (1986) (citing THE INSTITUTES OF JUSTINIAN bk. 1, tit. 1, pts. 1–6, at 65 (J. Thomas trans. 1965) ("By natural law, these things are common property of all: air, running water, the sea, and with it the shores of the sea.")) [hereinafter *Changing Conceptions*].

30. *Id.*

following collapse of the empire.[31] There is evidence the doctrine had was enforced by the Spanish,[32] French,[33] and English[34] in the mid-thirteenth century.[35] Later, during the era of Spanish and British imperialism, the doctrine rode the wave of colonization across the globe, and through this mechanism, the Public Trust Doctrine made landfall in the Americas.[36] The British colonies, established along the eastern seaboard of North America, were built upon English jurisprudence, and when the colonies later asserted their independence from England, despite the newfound freedom from British control, the British common law was so enmeshed in American colonial culture that a complete break from it was impossible.[37] The sovereignty that had formerly been bestowed upon the Crown was now vested in the individual states, and each state became the keeper of the land in the public trust.[38]

### *B. The Public Trust in the United States*

Since at least the 1820s, American courts have consistently invoked the Public Trust Doctrine to preclude private ownership of and to preserve the rights of the public to use of navigable waterways, their shores, and resources.[39] A seminal case from 1821, *Arnold v. Mundy*, describes the Public Trust Doctrine at the time:

> [T]he navigable rivers, where the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purposes of passing and repassing,

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31. *Id.*

32. *Id.* at 634 n.13. (citing LAS SIETE PARTIDAS, pt. 3, tit. 28, laws 3, 4, 6) ("Partida 3 was taken practically verbatim from Roman law.").

33. *See* Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 189 (1981) (citing M. BLOCH, FRENCH RURAL HISTORY 183 (1966)) [hereinafter *Liberating the Public Trust*].

34. *Changing Conceptions*, *supra* note 29, at 635 (citing 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 39, 40 (S. Thorne trans. 1968)).

35. *Id.* (citing H. BRACTON, 2 ON THE LAWS AND CUSTOMS OF ENGLAND 39–40 (S. Thorne trans. 1968); R. CLARK, 4 WATER AND WATER RIGHTS 99–100 (1967); Michael L. Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. FLA. L. REV. 561, 565–67 (1982)).

36. *See Changing Conceptions*, *supra* note 29, at 634 n.14.

37. *See generally* RC Dale, *The Adoption of the Common Law by the American Colonies*, AM. L. REG. (Sept. 1882) (discussing the inevitability of the adoption of British Common Law in the American Colonies).

38. *Id.*

39. *See* Arnold v. Mundy, 6 N.J.L. 1 (1821).

> navigation, fishing, fowling, and sustenance, and all the other uses of the water and its products . . . . are common to all the people, and . . . each [citizen] has a right to use [the water and its products] according to his pleasure, subject only to the laws which regulate that use; . . . the property indeed vests in the sovereign, but it vests in him for the sake of order and protection, and not for his own use, but for the use of the citizen; in the same sense in which he holds all the public property and the domains of the [sovereign], that the proceeds thereof may be collected into the public treasury, and applied to the public benefit and the public defense, and that he may have the direct, immediate, uncontrolled enjoyment of them.[40]

Another pivotal case considered to have historically defined the scope of the Public Trust Doctrine, and one that remains a primary authority, is *Illinois Central R.R. Co. v. Illinois*.[41] As defined by *Illinois Central*, under the Public Trust Doctrine:

> [T]he state holds the title to the lands under the navigable waters . . . within its limits, in the same manner that the state holds title to soils under tide water, . . . and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. . . . *It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.*[42]

*Illinois Central* establishes the ground rules of the American Public Trust Doctrine: a State has an inalienable duty to protect private citizens' rights to navigation, commerce, and liberty to fish (all of which may be read, presumably, as the public's right to access to the water, first and foremost).[43] However, as explained in the next section, many States have expanded upon *Illinois Central*.

### *C. The Fifty Public Trusts of the Individual States*

Despite the Supreme Court's rulings with regard to the baseline scope of the Public Trust Doctrine, states are constitutionally empowered to govern

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40. *Id.* at 12.
41. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).
42. *Id.* at 452 (emphasis added).
43. *Id.*

the public trust lands within their own boundaries.[44] Under the jurisprudence of the United States, the singular British Public Trust Doctrine evolved into fifty separate and unique doctrines, broadening in scope and depth as a response to differences in cultural and geographical needs in each state.[45] Over the last century, technological advances, population growth, industrialization, and environmental awareness have all influenced a variety of changes to doctrine.[46] Case law from a different jurisdictions illustrates the variance in scope and implementation of the Public Trust Doctrine.[47]

## III. THE MODERN TRENDS IN APPLICATION OF THE PUBLIC TRUST DOCTRINE

There are multiple scholarly theories floating in the ether regarding how the Public Trust Doctrine should be applied. For purposes of efficiency, these theories may be categorized as two primary groups: the traditional view and the modern view. The traditional view understands the doctrine as an inflexible rule that should not evolve beyond its original parameters established in Imperial England, or *Illinois Central*, depending on the theory.[48] The traditional views may vary slightly, but typically include iterations wherein the sovereign owns only land under waters that are subject to the tides or lands beneath navigable in fact waters for use by the public for a narrowly prescribed list of purposes, generally limited to rights to navigation, fishing, and commerce.[49] Alternatively, states that subscribe to the modern view, which sprang forth during the environmentalist movement of the 1970's, generally have more expansive interpretations of the doctrine.[50] Under the modern view, the doctrine is understood to be a legal Swiss Army knife by which citizens may require a state to protect

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44. *See* Martin v. Waddell's Lessee, 41 U.S. 367, 367 (1842).

45. *See, e.g.*, *Arnold*, 6 N.J.L. at 1 (expanding on the British Common Law's Public Trust, as discussed above).

46. *Changing Conceptions*, *supra* note 29, at 684–87.

47. Some States' theories suggest the public trust ought to include air quality, art, cemeteries, historical battlegrounds and other publicly devoted lands. *See* Hope Babcock, *Is Using the Public Trust Doctrine to Protect Public Parkland from Visual Pollution Justifiable Doctrinal Creep?*, 42 ECOLOGY L. Q. 1, 12–23 (2015) (discussing the pros and cons of expansion of the Public Trust Doctrine to prevent construction of a commercial building that would "tower over the tree line" of a public park).

48. *See generally*, *Changing Conceptions*, *supra* note 29 (discussing ancient variations of the Public Trust Doctrine and its application in modern times); *Liberating the Public Trust*, *supra* note 33 (pushing for a more expansive Public Trust Doctrine under the theory that in the face of modern threats, the doctrine must expand to suit the original intentions of the doctrine).

50. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

50. *See Liberating the Public Trust*, *supra* note 33, at 490.

enumerated trust interests via a variety of methods.[51] Admittedly, some modern view practitioners and scholars have expanded the doctrine beyond recognition[52]—but law evolves with society, and this push to expand is arguably a sign of a healthy legal system.

### *A. Traditional View v. Modern View*

The traditional view of the doctrine is flawed for one reason—law must evolve with the needs and social mores of society, or else the law becomes obsolete. The traditional view is inapplicable to questions presented by modern issues. The public policies of ancient Rome, England, and 1890's America are so far culturally and technologically removed from the issues of modern American states that the ancient iteration of the doctrine is nearly irrelevant. Applying the ancient doctrine to modern issues is akin to applying medieval medical treatments to modern disease—imagine presenting your physician with complaints of headaches and the physician prescribes drilling into your skull to relieve pressure. At some point, this treatment was likely cutting-edge, but has since become obsolete. Just as medieval medical practitioners had little knowledge of the various mechanism of headaches and no knowledge of aspirin, ancient jurists likely could not conceptualize the harm caused to public trust interests by industrial pollution, oil spills, agricultural and golf course runoff, commercial overfishing, and rising shorelines as a result of global warming. Thus, like any other doctrinal theory that America inherited from England, the public trust must change with the times and needs of the public.[53]

Conversely, the modern view of the Public Trust Doctrine is better suited for modern American states with growing populations, urban and industrial development and manufacturing. Importantly, many states' modern views provide a method by which private parties with particular interests in the public trust can check the potentially detrimental actions of

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51. *Changing Conceptions*, *supra* note 29, at 633–40 (explaining the traditionalist view and history of the Public Trust Doctrine).

52. *See* Babcock, *supra* note 47, at 12–23 (discussing the pros and cons of expansion of the Public Trust Doctrine).

53. For instance, the development of offertory estoppel from promissory estoppel. *Compare* James Baird Co. v. Gimbel Bros. Inc., 64 F.2d 344 (1933) (holding that promissory estoppel cannot be asserted to compel an offeror to perform where the offer is not meant to become a binding contract until consideration is received), *with* Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958) (holding that an offer which the offeror should reasonably expect to induce action or forbearance of a definite character by the offeree, and which does induce such action or forbearance, is binding if injustice can be avoided only by enforcing the offer by estoppel).

governments or their agents that have lost sight of the importance of maintaining the trust in lieu of attracting developers and industry to the region.[54]

### *B. Examples of Modern Public Trust States*

Presently, there are a variety of states that have expanded their Public Trust Doctrine, in some cases going as far as to constitutionalize it.[55] The following discussion examines case law from three states with expansive Public Trust Doctrines, California, Hawaii, and Pennsylvania, in an attempt to illustrate the reasoning and purpose behind such expansion for later analogous comparison with South Carolina's doctrine.

#### *1. California*

California has one of the most expansive Public Trust Doctrines. In *National Audubon Society v. Superior Court*,[56] the Supreme Court of California held that the Public Trust Doctrine imposed an affirmative duty on the state to protect people's common heritage of streams, lakes, marshlands, and tidelands, and may surrender that right only in rare cases when abandonment of that right is consistent with the purposes of the trust.[57] Furthermore, the court held that any member of the public had standing under the Public Trust Doctrine to sue a state agency to enjoin any actions injurious to the interests of the public under the trust.[58]

The dispute in *Audubon Society* began in the 1940's, when a state agency began diverting the water that fed Mono Lake into an aqueduct that supplied water to the City of Los Angeles.[59] Consequently, the level of Mono Lake dropped and the surface area diminished by one-third, putting at

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54. *See generally* Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 166 Cal. App. 4th 1349, 83 Cal. Rptr 588 (2008) (holding that under California trust law, a private party may hold the State accountable as a trustee for any harm the State permitted upon the Public Trust).

55. *See, e.g.*, PA. CONST., Art. I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.").

56. Nat'l Audubon Soc'y v. Super. Ct., 658 P.2d 709 (Cal. 1983).

57. *Id.* at 724.

58. *Id.* at 716 n.11 (citing Marks v. Whitney, 6 Cal. 3d 251, 261–62, 98 Cal. Rptr. 790, 797, 491 P.2d 374, 381 (1971)).

59. *Id.* at 711.

risk the "scenic beauty and ecological values of the lake."[60] Plaintiffs Audubon Society filed suit to enjoin the state agency from diverting the water under the theory that the lake's shore, bed, and waters were protected by the public trust.[61] The court reasoned that under California law, the public trust imposes a duty upon the State to protect the people's common rights to streams, lakes, marshlands, and tidelands.[62] As a fiduciary of the people and guardian of the public trust resources, the State was bound by a duty not to allow damage to the public trust without an overriding public interest.[63] Under this analysis, the State breached its duty to the public and overreached its authority when it began diverting water to such a degree that it harmed the trust interests in Mono Lake.[64]

Later, in 2008, in *Center for Biological Diversity, Inc. v. FPL Group, Inc.*,[65] a California Court of Appeals applied California trust law to analyze the powers and duties of the Public Trust Doctrine, ultimately determining that plaintiffs, as beneficiaries of the trust, may bring action against the appropriate agency of the state, responsible as trustee of the public trust, to compel that agency to bring action against the private parties that allegedly violated the trust.[66] Additionally, the court held that if the appropriate state agencies failed to bring such action, members of the public may alternatively bring an action in equity joining the alleged violator of the trust and the state agency in order to prevent loss of or prejudice to the claim.[67]

In *Center for Biological Diversity, Inc.*, private-party plaintiffs brought action against private owners and operators of wind turbines, claiming that operation of the turbines was responsible for killing and injuring raptors which were protected as part of the public trust under California law.[68] The court reiterated the holding from *Audubon Society*: the Public Trust Doctrine imposes a fiduciary duty on the state, in the same manner that traditional trust law does on a trustee, to preserve the natural resources held in the public trust for the benefit of the public.[69] However, the court noted that under traditional trust law, a beneficiary of a trust lacks standing to bring action directly against a third party that harms the trust and, in such cases,

60. *Id.*
61. *Id.* at 712.
62. *Id.* at 724.
63. *Id.*
64. *Id.* at 732.
65. Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 166 Cal. App. 4th 1349, 83 Cal. Rptr. 588 (2008).
66. *Id.* at 1360–61, 83 Cal. Rptr. at 596.
67. *Id.* at 1367, 83 Cal. Rptr. at 602.
68. *Id.* at 1354, 83 Cal. Rptr. at 591.
69. *Id.* at 1365–66, 83 Cal. Rptr. at 601 (citing *Nat'l Audubon Soc'y*, 658 P.2d at 709).

action must instead be brought by the trustee.[70] Thus, analogously, private parties cannot enforce the Public Trust Doctrine against other private parties, but the state can.[71] Moreover, by analogizing Public Trust relationships through the lens of traditional trust law, the court noted that a private citizen with an interest in a benefit of the Public Trust has standing to judicially compel the trustee-state to bring action against the tortfeasor third parties for damages to the public trust.[72]

*2. Hawaii*

In 2012, the Supreme Court of Hawaii held a public trust claim can be raised by members of the public who are affected by potential harm to the public trust—a showing of injury-in-fact is not required for standing.[73] The court reasoned that a citizen's interest in the public trust was a vested property interest and therefore, standing was based upon due process.[74] Furthermore, the court held that where uncertainty about present or potential threats of serious damage or degradation to the public trust exists, a "trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource."[75] Lastly, the court held that the public trust "compels the state duly to consider the *cumulative impact* of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate [any] impact . . . requir[ing] planning and decisionmaking from a global, long-term perspective."[76] Here, *In re 'Īao*, native organizations Hui O Nā Wai 'Ehā and the Maui Tomorrow Foundation sought review of a State decision by the Commission on Water Resource Management that amended standards for diversions of water for the Waihe'e River and the Waiehu, 'Īao, and Waikapū Streams.[77] Petitioners asserted the decision would affect protected traditional and customary native Hawaiian rights, appurtenant water rights, and the public trust.[78] It is

70. *Id.* at 1367, 83 Cal. Rptr. at 602 ("Under traditional trust concepts, plaintiff, viewed as beneficiaries of the public trust as not entitled to bring action against those whom they allege are harming trust property. . . .").

71. *Id.*

72. *Id.* at 1360–61, 83 Cal. Rptr at 596.

73. *In re* 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 287 P.3d 129, 183 (Haw. 2012).

74. *Id.* at 141.

75. *Id.* at 184 (quoting Waiahole I, *In re* Water Use Permit Applications, 9 P.3d 409, 466 (Haw. 2000)).

76. *Id.* at 190 (quoting Waiahole I, *In re* Water Use Permit Applications, 9 P.3d at 455).

78. *Id* at 132.

78. *Id.*

important to note here that under Hawaiian law, the Public Trust Doctrine has been constitutionalized and requires the State to conserve and protect Hawaii's natural beauty and resources, including land, water, air, minerals, and energy sources for the benefit of present and future generations.[79] The court, remarking on the constitutional nature of the issue, and basing its reasoning on *Audubon Society*, determined that any public citizen of the State who may be affected by potential harm has standing to bring action under the Public Trust Doctrine[80] and the Public Trust Doctrine compels the State to protect and conserve public trust resources by first considering the cumulative impact of any planning and development on the environment in the present as well as the future.[81]

*3. Pennsylvania*

In 2013, in *Robinson Township v. Pennsylvania*,[82] the Supreme Court of Pennsylvania held that the constitutionalized Public Trust Doctrine of the State imposed a fiduciary duty upon the State to protect and manage public trust resources from present and future harm and misuse.[83] There, the State's Supreme Court faced determining the constitutionality of Act 13, legislation that would permit the exploitation and recovery of natural gas located in the Marcellus Shale, but would simultaneously risk severe environmental effects.[84] Immediately following Act 13's ratification by the Governor of Pennsylvania, citizens filed a petition for review of the statute, requesting a declaration that the Act violated the Pennsylvania Constitution[85] and a permanent injunction prohibiting application of the act.[86] The court determined Act 13 was unconstitutional under the Pennsylvania Constitution, which imposes upon the Commonwealth of Pennsylvania a fiduciary obligation to "conserve and maintain," "prevent and remedy," and

79. HAW. CONST., Art. 11 § 1.

80. *In re* 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 287 P.3d at 183.

81. *Id.* at 190 (citing Waiahole I, *In re* Water Use Permit Applications, 9 P.3d at 455).

82. Robinson Twp. v. Pennsylvania, 83 A.3d 901 (Pa. 2013).

83. *Id.* at 959.

84. *Id.* at 914–16 ("The industry uses . . . hydraulic fracturing or "fracking" and horizontal drilling[,] . . . [b]oth techniques inevitably do violence to the landscape.").

85. *See* PA. CONST., Art. I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.").

86. *Robinson Twp.*, 83 A.3d at 915.

"refrain from permitting or encouraging the degradation, diminution, or depletion of" natural resources held in the public trust, whether such damages would occur through state action or the state's failure to restrain the action of private parties.[87] Furthermore, the court reasoned that because the constitution considered the beneficiaries of the trust as "all the people" of the state, including unborn generations, the court reasoned that the state owed a duty to protect the public trust for both present and future generations, the interests of which the state is required to balance impartially—present and future interests being equal.[88] This line of reasoning lead the court to conclude that the Public Trust Doctrine places a duty on the state to protect natural resources in the public trust equally from actions with immediate severe impacts on public trust as well as from actions with minimal or insignificant present consequence that are likely to have a significant or irreversible effect in the future.[89]

### *C. Resistance to the Modern Public Trust: Arguments for Traditional Application*

Despite the increasing number of courts that recognize the fiduciary duty the Public Trust Doctrine places upon States, a recent decision in an Oregon state court, currently pending appeal, shows that the movement is not unanimous.[90] In May of 2015, an Oregon state court held, in *Chernaik v. Brown*, that the state of Oregon does not consider the Public Trust Doctrine to encompass the waters of the state, the beaches, shoreline, fish, or wildlife, nor does the State owe a fiduciary duty under the Public Trust Doctrine to the public to protect such resources.[91]

In *Chernaik*, Plaintiffs brought action against the Governor of Oregon and the State requesting a Circuit Court to impose a fiduciary obligation on the Defendants to protect the atmosphere from climate change, declare a failure of the Defendants to do so, and compel Defendants to address the impact of climate change.[92] The court refused, but before one accepts this as the final word on Oregon's view of the public trust, the entirety of the circumstances surrounding the case should be reviewed objectively, as the

87. *Id.* at 957.

88. *Id.* at 959 (citing 1970 Pa. Legislative Journal–House at 2273).

89. *Id.*

90. Opinion and Order, Chernaik v. Brown, No. 16-11-09273, CIRCUIT COURT OF THE STATE OF OR. FOR LANE CTY. (May 11, 2015), http://courts.oregon.gov/Lane/docs/Chernaik%20v%20Brown%20Opinion.pdf.

91. *Id.* at 9–14.

92. *Id.* at 15.

refusal for the expansion of the trust may have been rooted in judicial caution, rather than legal analysis.

First, the plaintiff asked for a lower court to expand the scope of the existing public trust in Oregon. Regardless of the presiding Judge's personal interpretation of Oregon's Public Trust Doctrine, the state court judge was without the authority to make law, and such a ruling would effectively be law.[93] This was an issue better left to legislative powers.[94] Second, such egregious expansion the scope of the public trust *and* imposing simultaneous a duty upon the State to protect the trust assets[95] would open the floodgates[96] of litigation in the Circuit Courts, clogging a likely already backlogged system.[97] Therefore, one should note that the court in *Chernaik* was not only powerless to hold otherwise, due to standing precedent, but also foresaw that a decision to so rapidly expand the scope of the trust might cause more harm than good.

Similar to the decision in *Chernaik*, a handful of states' courts prefer to follow a Traditional Public Trust Doctrine. For example, Washington State courts have consistently refused to discuss the scope and duty of the Public Trust Doctrine, preferring instead to relegate the issue of control of waters to legislative action.[98] Furthermore, the Supreme Court of Iowa, despite recognizing that the Public Trust Doctrine is not necessarily limited to navigation or commerce and acknowledging that other States had expanded the scope of their public trusts, held that the court would not "subscribe to broad applications of the doctrine," and defined the public trust as only including navigation, commerce, and fishing.[99] Thus, it is clear that the trend toward expanding the scope of Public Trust is not universal and proposing such expansion in a conservative state may be met with some resistance.

## IV. SOUTH CAROLINA'S STANCE ON THE PUBLIC TRUST

South Carolina, like California and Hawaii, is a State with an abundance of coastline that plays a major role in the ecological and economic health of the State.[100] The role the Lowcountry has played in State is well known

93. *Id.* at 17.
94. *See id.*
95. *See id.* at 16.
96. Excuse the pun.
97. For similar results based on this reasoning, see Rettkowski v. Dept. of Ecology, 858 P.2d 232 (Wash. 1993) (en banc) and State v. Sorensen, 436 N.W.2d 358 (Iowa 1989).
98. *See Rettkowski*, 858 P.2d at 239–40.
99. *Sorensen*, 436 N.W.2d at 363.
100. *See supra* notes 1–8 and accompanying text.

among locals and, as a result, Lowcountry natives are particularly protective of their tidelands and beaches.[101] Furthermore, for years South Carolina's legislature has been protective of the State's natural resources, passing laws and regulation regarding beach front management well before other states did the same.[102] While it is not certain that a South Carolina court would be as expansive with the Public Trust as California, Hawaii, or Pennsylvania, there is some indication that the courts lean toward a more modern view.

### *A. The Scope of South Carolina's Public Trust*

There is no single writing that exhaustively defines the scope of South Carolina's Public Trust Doctrine. Like many states' doctrines, our Public Trust is primarily a creature of case law.[103] While a narrow portion of the scope of the doctrine (navigation rights) is included in our State's constitution and statutory law, in order to give shape to the scope of our State's doctrine, it is necessary to synthesize the codified adoptions of the doctrine with the case law that reflects its implementation.[104]

First, regarding its physical parameters, South Carolina's Public Trust is not notably expansive when compared to California, Hawaii, or Pennsylvania. The South Carolina Supreme Court has held the State holds presumptive title to land "below the high water mark of a navigable stream."[105] Navigability of a waterway is established by a determination of whether the waterway can be regularly floated for any purpose.[106] The type of flotation device used, and the specific use for which the flotation is implemented is not important to the determination of navigability.[107] As a result of this facet of the doctrine, the Lowcountry marshes and tidelands, including the pluff mud below the mean high water mark, include an immense amount of public trust land—nearly a half-million acres.[108] Unlike

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101. *Id.*

102. *See* S.C. CODE ANN. § 48-39-250, et seq. (2008).

103. McQueen v. S.C. Coastal Council, 354 S.C. 142, 580 S.E.2d 116 (2003) (citing a number of decisions concerning the Public Trust Doctrine).

104. *See* S.C. CODE ANN. § 49-1-10, et seq. (2008 & Supp. 2014); *McQueen*, 354 S.C. at 142, 580 S.E.2d at 116.

105. Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) citing State v. Hardee, 259 S.C. 535, 193 S.E.2d 497 (1972)).

106. State *ex rel.* Medlock v. S.C. Coastal Council, 289 S.C. 445, 449, 346 S.E.2d 716, 719 (1986).

107. *Id.* (citing Heyward v. Farmers Mining Co., 19 S.E. 963, 971 (S.C. 1894)).

108. *See* Bradford W. Wyche, *Tidelands and the Public Trust: An Application for South Carolina*, 7 ECOLOGY L. Q. 137, 138–39 (1978) (citing South Carolina Environmental Coalition, Tidelands 2 (1973) (brochure)).

California, Hawaii, and Pennsylvania, the scope of South Carolina's Public Trust does not include general natural resources and is limited only to lands beneath the navigable waters and certain defined ancillary public rights of use of those lands, the waters flowing over them, and the resources within.

With regard to the resources held in trust under the doctrine, some resources are clearly included within statutory and case law, while others are suggested but not confirmed. For instance, the State has constitutionalized the State's duty to preserve the navigability of waterways;[109] Case law further expands the scope of resources to include commerce, recreation, "marine life, water quality, [and] public access."[110] However, in *Sierra Club v. Kiawah Resort Assocs.*, the Supreme Court of South Carolina, while discussing the Public Trust Doctrine, noted:

> The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Traditionally, these things have included natural resources such as air, water (including waterborne activities such as navigation and fishing), and land (including but not limited to seabed and riverbed soils). Under this Doctrine, everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks.[111]

Thus, while the South Carolina General Assembly has not expressly expanded the nature of South Carolina's public trust to the degree that California, Hawaii, and Pennsylvania have, the State Supreme Court clearly expressed in *Sierra Club* that it has a modern view of the doctrine.[112] Unfortunately, it is less clear whether a lower court faced with a Public Trust

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109. S.C. CONST., Art. XIV, § 4. *See also* S.C. CODE ANN. § 49-1-10 (2008) ("All streams which have been . . . declared navigable streams . . . shall be common highways and forever free. . . . If any person shall obstruct any such stream . . . such person shall be guilty of a nuisance. . . .").

110. McQueen v. S.C. Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119–20 (2003) (citing *Sierra Club*, 318 S.C. at 119, 456 S.E.2d at 397). *See also* Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co., 148 S.C. 428, 146 S.E. 434 (1928) (holding that the purpose of the public trust is to protect navigation and fishery of navigable waterways).

111. *Sierra Club*, 318 S.C. at 119, 456 S.E.2d at 402 (quoting Gregg L. Spyridon & Sam A. LeBlanc, *The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action*, 6 TUL. ENVTL. L.J. 287 (1993)).

112. *See id.*

issue would rely on the dicta of *Sierra Club* or argue, like the court in *Chernaik*, that such expansion can only be established by legislation.

### *B. Establishing a Duty Under the Public Trust Doctrine*

#### *1. Statutorily Imposed Duties*

The Supreme Court of South Carolina interpreted the legislation creating the South Carolina Coastal Council[113] and the South Carolina Department of Health and Environmental Services as implicitly charging the council with a duty to manage and protect public trust lands in accordance with the Public Trust Doctrine.[114] Furthermore, Statutorily, the South Carolina Department of Health and Environmental Control is explicitly vested with duties to "promulgate necessary rules and regulations to carry out the provisions of [the Coastal Tidelands and Wetlands] chapter"; to administer the provisions of the chapter and all rules and regulations created under it; "to examine, modify, approve or deny applications for permits for activities covered by the provisions of [the] chapter;" "to revoke and suspend permits of persons who fail or refuse to carry out or comply with the terms and conditions of the permit;" "to enforce the provisions of [the] chapter" and bring legal action against offensive parties; "manage estuarine and marine sanctuaries and regulate all activities therein, including the regulation of the use of the coastal waters located within the boundary of such sanctuary."[115]

#### *2. An Argument for a Broader, Three-Tiered Common Law Duty*

Additionally, expanding on the statutorily imposed duties of the Department of Health and Environmental Control, the Supreme Court of South Carolina has held that "[t]he *state* . . . cannot permit activity that substantially impairs the public interest [in the trust]."[116] This holding arguably establishes a three-tiered fiduciary duty upon the State as a

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113. The South Carolina Coastal Council no longer exists and its duties have been subsumed by South Carolina Department of Health and Environmental Control. *See Ocean and Coastal Resource Management*, DHEC, http://www.scdhec.gov/HomeAndEnvironment/Water/CoastalManagement/ (last visited Jan. 19, 2017).

114. *Sierra Club*, 318 S.C. at 128, 580 S.E.2d at 402 (interpreting S.C. CODE ANN. § 48-39-10, et seq. (2008 & Supp. 2014)).

115. S.C. CODE ANN. § 48-39-50 (2008).

116. McQueen v. S.C. Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119–20 (2003).

whole—a duty that rests on every branch of the State government, as a trustee of the public trust.[117] The first tier of duty includes the State legislature and agencies passing laws and regulations that are sufficient to prevent harm from befalling the public interests in the public trust.[118] The second tier includes the State's executive branch's duty to manage and protect the enumerated resources in the trust by enforcing legislation.[119] The third tier includes the duty of the judiciary to hold the legislature and government accountable as trustees of the Public Trust interests.[120] In accord with this theory, Joseph Sax argued that *Illinois Central R.R. Co.* established that the Public Trust Doctrine imposes a duty both upon the State government to manage and protect public trust resources, and also upon the judiciary to "look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restrictive uses or to subject public use to the self-interest of private parties."[121] Thus, under this theory of a three-tiered duty, any party with standing may bring action against any branch of the state government for breach of its fiduciary duty to protect that party's interests in the trust.

## V. POTENTIAL CLAIMS AGAINST THE STATE UNDER THE PUBLIC TRUST DOCTRINE AND THE THREE-TIERED DUTY

The following discussion explores potential claims that might be brought against the State under the Public Trust Doctrine and the three-tiered duty it imposes.[122] First, Part A of this section discusses standing requirements to bring claims under the Public Trust Doctrine[123]—an issue already answered in South Carolina Courts.[124] The discussion analyzes existing South Carolina case law where citizens brought action under the Public Trust Doctrine to enjoin the State from granting permits to private parties—some successfully.[125] The result establishes parameters suggesting what sorts of facts a South Carolina court might require a party to present in order to grant such an injunction. Second, Part B of this section covers an

117. *See id.*

118. *See* S.C. CODE ANN. § 48-39-50 (2008).

119. *See id.*

120. *See* Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 490 (1970).

121. *Id.* at 489–91.

122. *Id.*

123. *See* Part V(A).

124. *See* Smiley v. S.C. Dept. of Health & Envt'l Control, 374 S.C. 326, 649 S.E.2d 31 (2007).

125. *See* Part V(A).

issue novel to South Carolina courts—whether a court would allow a citizen to enjoin an appropriate State agency to compel the agency to file a claim against a private party for injuring public trust interests.[126] Last, and most novel, Part C explores whether the duty the Public Trust Doctrine imposes on the State falls under traditional trust law, is fiduciary in nature, and whether breach of that duty gives rise to a claim for breach of fiduciary duty against the State, as has been established in California.[127]

### *A. Standing*

It was made clear in *Smiley v. S.C. Department of Health and Environmental Control*[128] that an impending threat to a public trust interest satisfied the standing requirement where it could be shown that certain behavior was the cause of the threat.[129] In *Smiley*, the plaintiff brought action to challenge a permit issued by the Office of Ocean and Coastal Resource Management that permitted a private party's removal of sand from a local beach.[130] Plaintiff asserted that exercise of the permit threatened to destroy the hard-packed beach upon which he jogged for rehabilitation purposes, used for recreation, nature watching, and similar pursuits.[131] The court ruled the plaintiff had standing because the permitting decision directly threatened the plaintiff's viable personal interests in the Public Trust.[132]

To take the question of standing one step further, under the State Torts Claim Act, citizens of the State have standing to bring claims against the State for the State's gross negligence in administering licensing and permitting powers.[133] Thus, private parties in South Carolina have standing to bring action to both enjoin the State from, and possibly to sue the State for, permitting other private parties to harm to the protected interests of the public trust.[134]

126. *See* Part V(B).
127. *See* Part V(C).
128. *See Smiley*, 374 S.C. at 326, 649 S.E.2d at 31.
129. *Id.* at 329, 649 S.E.2d at 32–33.
130. *Id.* at 328–29, 649 S.E.2d at 32.
131. *Id.*
132. *Id.* at 333, 649 S.E.2d at 34.
133. S.C. CODE ANN. § 15-78-60(12) (2005).
134. *See id.*

### *B. Enjoining the State from Granting Certain Permits*

South Carolina courts have more than once enjoined government offices from granting permits that would threaten or harm the protected interests of the public trust.[135]

First, in *State ex rel. Medlock v. South Carolina Coastal Council*,[136] the League of Women Voters of South Carolina brought action against the South Carolina Coastal Council, challenging the validity of a permit the Council had granted to a private citizen that authorized the complete blockage of a manmade generations-old "navigable waterway."[137] The Council had issued a permit to impound 660 acres of wetlands that was regularly flooded by normal tidal action located on private property, an action that would result in the loss of fifty acres of marsh and remove the 660 acres from the Santee Estuarine System.[138] The waterways at issue were manmade and had historically used in the cultivation of rice, but in recent years had become regularly used by the general public as natural watercourses to access the interior of the island, facilitated the movement of water, and housed various organisms and organic materials important to the adjacent marshland.[139] First, the court noted, with regard to its jurisdictional power to overrule a State Agency's decisions, that the scope of its review over any administrative agency's decision was statutorily prohibited unless plaintiff had exhausted all other avenues of remedies provided by the Agency in question.[140] Second, the court recognized that its decision could only replace that of an agency if the agency's initial decision had been affected by an "error of law."[141] Following its procedural analysis, the court determined that the waterway was navigable in fact and therefore, under the Constitution of South Carolina and statutory and case law of South Carolina with regard to the public trust, the Coastal Council had exceeded its authority to authorize the complete blockage of navigable streams and waterways—especially as there was no overriding public interest in

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135. *See, e.g.*, State *ex rel.* Medlock v. S.C. Coastal Council, 289 S.C. 445, 346 S.E.2d 716 (1986) (enjoining the South Carolina Coastal Council from permitting the private blockage of more than six-hundred acres of navigable wetlands for private purposes because the exclusive use by a private owner would have detracted that acreage from the Public Trust).

136. *Id.*

137. *Id.* at 446–47, 346 S.E.2d at 717.

138. *Id.* at 447, 346 S.E.2d at 717–18.

139. *Id.* at 448, 346 S.E.2d at 718.

140. *Id.* (citing S.C. CODE ANN. § 1-23-380(g) (1983 Supp.) ("Judicial review upon exhaustion of administrative remedies. . . .")).

141. *Id.* (citing S.C. CODE ANN. § 1-23-380(g) (1985 Supp.); Carter v. S.C. Coastal Council, 281 S.C. 201, 202, 314 S.E.2d 327, 328 (1984).

impounding the waterway.[142] Thus, from this decision it is clear that a South Carolina court will enjoin an agency's granting of a permit if the permitted action will risk harm to the trust and the agency cannot show that its decision to grant such permit was of such significant public interest as to outweigh those risks.

Furthermore, in *State v. Columbia Water Power Co.*, the Supreme Court of South Carolina, faced with the issue whether to enjoin Columbia Water Power Company and the City of Columbia's construction of a bridge that would inhibit recreational navigability of the waterway over which it reached, reasoned:

> [W]here the wrong is clear, and the injury *present* and *manifestly impending*, the Court will rarely refuse the injunction, especially if public property, safety, health or welfare is impaired or threatened, or the nuisance is permanent and maintained in defiance of a law expressive of the public policy of the State. . . . The State, as a sovereign, holds the property right of unobstructed navigation of the navigable waters of the State in trust for the people of the State and of the United States.[143] This is a property right of great value. It is well established that an individual has a right to injunction against threatened, repeated, or continued injury to his property rights. For a greater reason has the State, as trustee for the people, a right to the intervention of the Court to protect the valuable right of free navigation. When the right is *clearly established*, as it has been in this case, not only under the common law and constitutional and statute law of the State . . . the Court would be acting arbitrarily to refuse the injunction. The right of the State and the proposed violation by the defendants of that right, being perfectly clear, the Court cannot refuse to enforce the State's right by enjoining the defendant's proposed obstruction on the ground that the right of navigation of the Columbia Canal may be of small value in comparison with the great value to the city of Columbia of the obstruction it proposes to erect.[144]

The court further clarified that "the Court cannot refuse to . . . enjoin[] [a] defendant's proposed obstruction on the ground that the right of [the

142. *Id.* at 450, 346 S.E.2d at 719.
143. State v. Columbia Water Power Co., 82 S.C. 181, 63 S.E. 884 (1909).
144. *Id.* at 193–94, 63 S.E. at 890.

public trust] may be of small value in comparison with the great value to the [State] of the obstruction it proposes. . . ."[145]

However, this power to enjoin a party is limited, as a moving party must be able to show significant impending injury to the rights under the public trust doctrine.[146] In *Sierra Club v. Kiawah Resort Associates*,[147] the Supreme Court of South Carolina denied the grant of an injunction against the Coastal Council for the issuance of a permit to construct thirty-six docks over public trust lands, when the court found the Council had shown sufficient evidence that the construction of the docks would not significantly degrade and limit public access to shellfish beds or other public trust interest located in the vicinity of the proposed docks.[148] There, the court concluded, following testimony by the Council's witnesses that the docks would not "substantially impair" the public interest in the lands and water by harming marine life, water quality, or public access, that the permits would not violate the public trust doctrine.[149]

By synthesizing *Columbia Water Power Co.* with *Sierra Club*, in order for a South Carolina court to grant an injunction against a party under the Public Trust Doctrine, the moving party must show: (1) a present or manifestly impending "substantial" injury; (2) to a clearly established Public Trust interest, no matter how comparatively insignificant.[150]

### *C. Enjoining the State to Bring Action Against the Injurious Party*

As previously discussed, California's courts have ruled that under traditional trust law, private parties have the right to bring action against the State to compel the State to protect Public Trust rights by controlling other private parties' actions that affect the trust, but private parties cannot enforce the Public Trust Doctrine directly against other private parties.[151] This issue is entirely novel in South Carolina. Presently, no case law provides whether a South Carolina court would recognize the "citizen is to State" relationship with regard to the Public Trust as one of "beneficiary is to trustee." However, South Carolina courts have consistently, if not uniformly, referred

145. *Id.* at 194, 63 S.E. at 890.

146. *See* Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 456 S.E.2d 397 (1995) (emphasis added).

147. *Id.*

148. *Id.* at 125, 128, 456 S.E.2d at 399, 402.

149. *Id.* at 128, 456 S.E.2d at 402.

150. *See id.*

151. Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 83 Cal. Rptr. 588, 591 (Ct. App. 2008).

to the public as "beneficiaries" as to that which the State holds in "trust," and which the State has a "duty to protect."[152] Thus, it seems the South Carolina judiciary has already determined that the State's responsibility to protect the trust is fiduciary in nature, although no court has expressly stated that the relationship of the citizens and the State with regard to the Trust is one governed by traditional trust law. However, as South Carolina courts appear to have adopted a modern view of the Public Trust Doctrine, lower courts may look to other modern-view states' Public Trust doctrines.[153] If so, a South Carolina court may conclude the "citizen is to State" relationship under the Public Trust Doctrine is governed under the South Carolina Trust code.

Under the South Carolina Trust code, a trustee has a duty to "secure payment of any choses in action" arising from the trust property.[154] A trustee's violation of a duty owed to the beneficiary is a breach of the trust;[155] to remedy this breach,[156] a court may compel the trustee[157] to perform that duty.[158] Therefore, if a right to sue in the name of the Public Trust arises against a private party, it is a duty of the State as trustee to pursue that action. If the State fails to pursue that action, the State has breached its duty as trustee and may be compelled by the court to bring action as trustee against the injurious party on behalf of the beneficiaries of the trust.[159] Therefore, if a South Carolina court looks to the Trust code to govern Public Trust relationships, it is almost certain to rule that a private party beneficiary may bring action to compel the appropriate State agency to sue the injurious party.[160]

Conversely, under the Trust code, a person who deals in good faith with a trustee without knowledge that the trustee is exceeding or improperly exercising his powers is protected from liability.[161] This section of the code, if applied to Public Trust issues, would exculpate any private party found to have dealt with the State with a good faith belief that following the State's

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152. *See, e.g.*, McQueen v. S.C. Coastal Council, 354 S.C. 142, 580 S.E.2d 116 (2003) (holding that the State cannot allow harm to befall certain enumerated aspects of the State's waterways which it holds in trust for the public as beneficiaries).

153. *See id.*

154. S.C. CODE ANN. § 62-7-809, cmt. (2009) (citing RESTATEMENT (SECOND) OF TRUSTS § 175 cmt. a, c, & d (1959)).

155. S.C. CODE ANN. § 62-7-1001(a) (2009).

156. *See id.*

157. *See id.*

158. S.C. CODE ANN. § 62-7-1001(b)(1) (2009).

159. *See id.*

160. *See id.*

161. S.C. CODE ANN. § 62-7-1012(a) (2009).

regulations was sufficient to avoid liability. This leaves open the question: what happens when a private party follows all the State's rules, but those rules are insufficient to protect the Public Trust?

Ultimately, this is an issue that has not been faced by a South Carolina court. The fact that the issue is entirely novel leaves any number of possibilities open, but it seems more likely that, like the court in *Chernaik*, a South Carolina court would consider the issue to be political in nature and one that should be answered by legislation.

### *D. Breach of a Fiduciary Duty Owed to the Public*

In South Carolina, to recover for breach of fiduciary duty, a plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant.[162] Presently, there is no jurisdiction that allows for a private party to bring action against a state to recover for harms to the Public Trust that resulted from a breach of the fiduciary duty imposed under the Public Trust Doctrine. However, it only goes to reason that under trust law, private citizens should be able to recover for harm to their Public Trust interests and ultimately recover funds that would be redirected to repair the harmed trust property interests. This section discusses the legal theory of how a citizen might succeed in a claim against the State for breach of its fiduciary duty in being grossly negligent by granting foreseeably harmful permits.

First, for this theory to work, it must be established that South Carolina owes to its citizens a fiduciary duty in the form of a "trustee to beneficiary" dynamic to protect and maintain the Public Trust. Whether a fiduciary relationship has been breached is a question of fact; whether one should be imposed between two classes of people is a question of law.[163] A South Carolina court concluding that the State owes its citizens a fiduciary duty as established under the Trust code with regard to Public Trust property seems possible, if not likely, as South Carolina courts have in the past expressed a modern affect with regard to the Trust, as discussed above.

Under the Trust code, a trustee has an affirmative duty to administer a trust in *good faith* in accordance with the trust's terms and purposes and the interests of the beneficiaries,[164] as well as to take all *reasonable steps* to

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162. RFT Mgmt. Co. v. Tinsley & Adams, L.L.P., 399 S.C. 322, 335–36, 732 S.E.2d 166, 173 (2012).

163. Hendricks v. Clemson Univ., 353 S.C. 449, 459, 578 S.E.2d 711, 715 (2003) (overruled on other grounds).

164. S.C. CODE ANN. § 62-7-801 (2009).

control and protect the trust property.[165] Moreover, a trustee must administer the trust *solely in the interests of the beneficiaries*--a conflict between personal and fiduciary interests of the trustee is automatically void if the sale, encumbrance, or transaction is detrimental to the beneficiaries' interests in the trust property.[166] Additionally, any beneficiary whose rights are threatened has standing to sue a trustee.[167] "Beneficiary" includes anyone with a vested interest to present or future distributions.[168]

So, if trust law applies to the relationship between the State and its citizens under the Public Trust Doctrine, the State is burdened with a duty to make a good faith effort and take reasonable steps to manage and protect the Public Trust resources from "activity that substantially impairs the public interest in" the trust.[169] Moreover, the State is bound by a duty not to engage in transactions that would harm the Public Trust, even if the harm is slight.[170] Under this analysis, it is clear that any State or state agency decision that poses a threat or puts at risk the public trust is an automatic breach of a fiduciary duty owed to the public.

However, unlike a regular citizen, the State is granted limited liability against certain tort claims.[171] Under the South Carolina Torts Claims Act, the State, nor any agency or entity of the State, may be found liable for a loss resulting from failure of the legislature or judiciary to enforce or enact any statute or regulation.[172] Additionally, liability may not be established for a loss resulting from the State exercising its power to license or issue permits, except in cases when the power was exercised in a grossly negligent manner.[173] This, of course, throws a sizable wrench into the cogs of any attempt to judicially hold state agencies accountable for harm caused to the Public Trust via negligent permit granting. However, if it can be established that the State or its agents acted in a *grossly negligent manner* with regard to the granting of a license or permit, recovery may be had under a claim against the State for gross negligence in the breach of the fiduciary duty under the Public Trust Doctrine.[174]

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165. S.C. CODE ANN. § 62-7-809 (2009).
166. S.C. CODE ANN. § 62-7-802 (2009).
167. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 197, 198, 199, 200 (1959).
168. RESTATEMENT (THIRD) OF TRUSTS § 82 (2007).
169. *See supra* notes 163–168 and accompanying text.
170. *See id.*
171. See S.C. CODE ANN. §§ 15-78-20, 40, 60 (2005 & Supp. 2014).
172. S.C. CODE ANN. § 15-78-60(1), (2) (2005).
173. S.C. CODE ANN. § 15-78-60(12) (2005).
174. Hollins v. Richland Cty. Sch. Dist. One, 310 S.C. 486, 487, 427 S.E.2d 654, 655 (1993) (citing S.C. CODE ANN. § 15-78-60(25) (Supp. 1991)).

Gross negligence in South Carolina has been defined by the courts in a number of ways.[175] It has been held to be "the failure to exercise slight care,"[176] "the intentional conscious failure to do something which it is *incumbent* upon one to do or the doing of a thing intentionally that one ought not to do,"[177] and "[to be] a relative term, [meaning] the *absence of care that is necessary under the circumstances*."[178]

So, stringing all of the relevant law together: if a South Carolina court (1) recognizes that the Public Trust Doctrine imposes a fiduciary duty upon the State, then (2) the court should also recognize a breach of that duty for which the State may be held accountable when (3) a State agency grants permission or license to private parties to engage in harmful behavior (4) without the State taking the reasonable steps that are incumbent upon the State to prevent substantial harm to the Public Trust. Seems clear enough, right? However, the "reasonable steps" the State must undertake as trustee of the Public Trust is pretty murky.

### *E. So, What is "Reasonable" Anyway?*

It is simple to say that the State must take "all reasonable steps" to prevent damage to the property of the Public Trust, but it is difficult to define what those reasonable steps are, because it is impossible to predict with certainty the severity of yet-unperformed actions' impacts that might lead to future damages of protected Public Trust resources.

On one hand, all coastal development will at some time directly or indirectly negatively affect the Public Trust to some degree. However, it is impossible to separate the effects of thousands of day-to-day seemingly harmless licensed/permitted individual acts from one another to extract the value of the individual harms that cumulatively will "substantially affect" Public Trust interests in the future. If the courts were to interpret strictly the State's Public Trust Doctrine, the result would be a complete bar on building, development, residing, or visiting of coastal lands, and possibly inland development, too. Under this paradox, the only way to truly protect Public Trust interests is to prevent everyone from using the Public Trust,

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175. *Id.* at 490, 427 S.E.2d at 656.

176. Anderson v. Ballenger, 166 S.C. 44, 55, 164 S.E. 313, 317 (1932) (citing Ford v. Atl. Coast Line R.R., 169 S.C. 41, 168 S.E. 143 (1932)).

177. Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988) (emphasis added).

178. Hicks v. McCandlish, 221 S.C. 410, 415, 70 S.E.2d 629, 631 (1952) (emphasis added).

which of course divests every one of his or her Public Trust interests.[179] Of course this result is unreasonable.

On the other hand, the rate at which the State is permitting areas along South Carolina's coast to be developed arguably falls outside the scope of "reasonable steps" to protect the Public Trust. In its 2015 Recreational Water Quality Scorecard, Charleston Waterkeeper, a non-profit environmental group based out of Charleston, SC, after testing water for fecal indicator bacteria, enterococci, labeled nine of fifteen tested Charleston waterways as "swimming not recommended," another five as "proceed with caution," and only one as "safe for swimming."[180] The same sites were tested in 2014, with nine waterways labeled as "swimming not recommended," one as "proceed with caution," and five as "safe for swimming."[181] In 2013, the same sites were tested and only eight waterways failed, while the remaining seven were safe to swim.[182] Additionally, following any flooding of the Charleston area, which occurs during almost any rainfall that coincides with a high tide, the South Carolina Department of Health and Environmental Control will close shellfish grounds for harvesting as a result of high levels of coliform bacteria[183]—this is a direct and substantial effect on the public's interest in fishing in the Public Trust. So, has the State acted in gross negligence in granting permits for such development to occur? That depends entirely on whether the State or its permitting agencies should have recognized that overdevelopment would lead to this type of pollution. The fact of the matter is that countless data existed prior to South Carolina's boom in coastal development that showed that urban development near waterways typically causes these exact issues.[184]

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179. Would this be a Fifth Amendment Takings issue?

180. *Charleston Waterkeeper 2015 Recreational Water Quality Scorecard*, CHARLESTON WATERKEEPER, http://charlestonwaterkeeper.org/wp-content/uploads/2016/02/scorecard-2015-web.pdf (last visited Jan. 20, 2017).

181. *Charleston Waterkeeper 2014 Recreational Water Quality Scorecard*, CHARLESTON WATERKEEPER, http://charlestonwaterkeeper.org/wp-content/uploads/2015/02/2015-score card-final-web.pdf (last visited Jan. 20, 2017).

182. *Charleston Waterkeeper 2013 Recreational Water Quality Scorecard*, CHARLESTON WATERKEEPER, http://charlestonwaterkeeper.org/wp-content/uploads/2014/08/scorecard-final-low-res-spreads-1.pdf (last visited Jan. 20, 2017).

183. *Marine-Shellfish*, S.C. DEP'T OF NAT. RES., http://www.dnr.sc.gov/marine/shellfish/regs.html (last visited Jan. 23, 2017).

184. *See* H. Heukelekian, et al., *Water Pollution*, 25 SEWAGE & INDUSTRIAL WASTES 653 (June 1953); Richard D. Hoak, *Water Supply and Pollution Control*, 25 SEWAGE & INDUSTRIAL WASTES 1438 (Dec. 1953); H. Heukelekian, et al., *Water Pollution*, 30 SEWAGE & INDUSTRIAL WASTES 839 (June 1958); L. Coin, et al., *Modern Microbiological & Virological Aspects of Water Pollution*, 1 ADVANCES IN WATER POLLUTION RESEARCH 1

Of course, the first and most obvious "reasonable step" by the State to minimize the effects of developmental pollution is to pass legislation tailored to do exactly that. The State has done this by creating agencies tasked with defining pollution, how it should be controlled, and penalties for those who disobey the regulations.[185] Ideally, these regulations should effectively deter polluters. However, the state of the health of South Carolina's waterways suggest one of two possibilities: first, the regulations' accompanying penalties are insufficient to deter polluters from polluting, or, second, if the regulations' penalties are deterring pollution, then the regulation is insufficient with regard to the parameters of "acceptable pollution."[186] There are fourteen of fifteen water-quality-tested creeks in Charleston County that are reported un-swimmable due to runoff pollution—this is not "acceptable."[187] Not only do the regulations leave gaps in what is to be controlled,[188] but the agencies either fail to enforce the regulation, or private parties ignore the regulation without punishment.[189] In conclusion, efforts by the State to pass regulations alone are insufficient to be deemed "reasonable steps" to protect the Public Trust.

To satisfy the "reasonable steps" requirement of South Carolina's Trust law, the State must police development with a scrutinizing eye, regulating not only citizens but itself, and, if the regulations are breached by any party, the State must take action to correct the injuries to the Public Trust, lest the State be in breach of its fiduciary duty to protect the Public Trust.

Thus, under the three-tiered duty imposed by the Public Trust, the left hand must watch what the right hand is doing: self-monitoring and regulation by all branches of the State government is required for the State

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(1965); Edison L. Quan, et al., *Effects of Surface Runoff & Waste Discharge into the Southern Sector of Kaneohe Bay*, WATER RESEARCH CTR., UNIV. OF HAW. AT MANOA, 35 (Jan. 1970).

185. *See* S.C. CODE ANN. § 48-39-50 (2008).

186. *See* Bo Peterson, *Fishable? Swimmable? Charleston Waters in Trouble*, POST & COURIER (Charleston, S.C.) (Apr. 19, 2015), http://www.postandcourier.com/article/20150419/PC16/150419369/1177.

187. *Id.*

188. Codi Kozacek, *While South Carolina Floods, U.S. Wrestles with Urban Stormwater*, CIRCLE OF BLUE (Oct. 6, 2015), http://www.circleofblue.org/waternews/2015/world/while-south-carolina-floods-u-s-wrestles-with-urban-stormwater/ (noting failures in the Federal Clean Water Act to include swaths of varieties of runoff pollution that has been shown to directly impair nearly 240,000 kilometers of rivers and streams and more than 404,000 hectares (1,000,000 acres) of lakes, ponds, and reservoirs).

189. *See* Charles Duhigg, *Clean Water Laws Are Neglected, at a Cost in Suffering*, N.Y. TIMES (Sept. 12, 2009), http://www.nytimes.com/2009/09/13/us/13water.html; Julie Turkewitz, *Environmental Agency Uncorks its Own Toxic Water Spill at Colorado Mine*, N.Y. TIMES (Aug. 10, 2015), http://www.nytimes.com/2015/08/11/us/durango-colorado-mine-spill-environmental-protection-agency.html.

satisfy this duty. The legislature must pass sufficiently stringent laws with the purpose of protecting the public trust. The executive branch must successfully enforce these laws. And if the laws are at risk of being broken or if the Public Trust is harmed, the judiciary must hold accountable those responsible in order to prevent or repair the damages. Finally, if the legislature fails to enact sufficiently protective laws, or if the executive fails to properly enforce those laws, the judiciary should have the power hold those branches accountable for harm that arises out of the failures.

## VI. CONCLUSION

Whether one is interested in protecting the Lowcountry's economy, culture, or environment, it is imperative that efforts be made to better control the urban and industrial development along South Carolina's coast. As the State legislature and State policing have yet to successfully protect the interests of the Public Trust, it falls upon the judiciary of the State to enjoin granting of certain harmful permits and hold not only third parties, but the State itself, accountable for damages. It is an unfortunate fact that balancing industry and development with environmental interests is difficult, and sometimes impossible, but South Carolina has too much to lose by risking the health of its waterways for general financial gain—especially when the source of financial gain will likely harm other avenues of income, like coastal tourism. As the case law and basic common sense makes clear, the Public Trust interests of all citizens should always carry greater weight when balanced against financial interests of a few.

However, without such actions being brought to the courts' attention by injured parties, the law will not be established, nor will the resources be satisfactorily managed or protected. Ultimately, the duty is not only upon the State, but upon the citizens of the State to draw attention to the harm that urban development and industrialization causes the Public Trust.